STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KEELY SHAYE LILLIAN MARIE GIBSON-NEWBERRY and MERCEDES ISABELLA MAE GIBSON-NEWBERRY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DAVID LEE NEWBERRY,

Respondent-Appellant,

and

TASHA MARIE GIBSON-NEWBERRY,

Respondent.

UNPUBLISHED
October 25, 2005

No. 261614
Branch Circuit Court
Family Division
LC No. 04-002805-NA

In the Matter of KEELY SHAYE LILLIAN MARIE GIBSON-NEWBERRY and MERCEDES ISABELLA MAE GIBSON-NEWBERRY, Minors.

DEPARTMENT OF HUMAN RESOURCES,

Petitioner-Appellee,

v

TASHA MARIE GIBSON-NEWBERRY,

Respondent-Appellant,

and

DAVID LEE NEWBERRY,

No. 261657
Branch Circuit Court
Family Division
LC No. 04-002805-NA

Respondent.

Before: Kelly, P.J., and Meter and Davis, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court's order terminating their parental rights to the minor children under MCL 712A.19b(3)(c)(i),[1] (regarding respondent mother) and MCL 712A.19b(3)(j),[2] (regarding respondent father). We affirm.

Respondent mother's first contention on appeal is that the parents' admissions were insufficient to confer jurisdiction over the children. This issue is not properly before us because it relates to the trial court's exercise of jurisdiction, which cannot be collaterally attacked in an appeal from the order terminating parental rights. *In re Hatcher,* 443 Mich 426, 439-440, 444; 505 NW2d 834 (1993); *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005). Even if the issue were properly before the Court, it is not preserved for review because respondent mother did not seek to withdraw her plea in the trial court, and she did not raise any issue concerning the trial court's noncompliance with the court rule governing pleas. See, e.g., *In re Zelzack,* 180 Mich App 117, 122-123; 446 NW2d 588 (1989), and *In re Campbell,* 170 Mich App 243, 249-250; 428 NW2d 347 (1988). In any event, a review of the record indicates that respondent mother's plea was adequately supported. Respondent mother correctly notes that her prior plea of nolo contendere to charges of fourth-degree criminal sexual conduct was not admissible in the jurisdictional phase of the juvenile proceedings, in which the rules of evidence apply. *In re Andino,* 163 Mich App 764, 770; 415 NW2d 306 (1987); MCR 3.972(C)(1); MRE 410. However, the record supplied other evidence adequate to establish that one or more of the statutory grounds alleged in the petition were true, as required by MCR 3.971(C)(2). Specifically, respondent mother's admission that at the time of the petition she lacked a job or home was adequate to establish at least one statutory ground for jurisdiction alleged in the petition and found in MCL 712A.2(b)(1). Although the trial court improperly relied on respondent mother's nolo contendere plea to fourth-degree criminal sexual conduct, this Court will not reverse when the lower court reaches the right result for the wrong reason. *Grand Valley Health Center v Amerisure Ins Co,* 262 Mich App 10, 21; 684 NW2d 391 (2004).

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[1] This subsection states:

> The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds [that] . . .
>
> [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

[2] This subsection states: "There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

Respondent mother next argues that the trial court improperly removed the children from the home without making the findings required by MCR 3.965(C)(3). However, the record reveals that, contrary to respondent mother's argument, the court made specific findings that placement of the children in the home was contrary to their welfare because respondent mother was incarcerated and respondent father lacked the ability to care for the children. Respondent mother also points out that the trial court did not advise respondents of their ability to contest the removal within fourteen days at a dispositional review hearing and to use compulsory process to obtain witnesses for this hearing, as required by MCR 3.974(B)(3)(a)(ii) and (iii). However, the requirements of MCR 3.974(B)(3)(a) relate to emergency removal hearings when a child under the court's jurisdiction has been returned home from foster care or has remained in the home following the initial dispositional hearing. MCR 3.974(B). In the instant case, neither of those situations existed because removal was ordered at the initial dispositional hearing.

Respondent mother next objects to the trial court's admission of the testimony of Dr. James Henry, who assessed the developmental levels of the children, because his written reports were not provided to respondents until the morning of his testimony. The trial court allowed a recess of forty-five minutes for respondents' counsel to review the reports. Both respondents had the opportunity to cross-examine Dr. Henry and did so. The trial court did not abuse its discretion by allowing Dr. Henry to testify. See *In re MU*, 264 Mich App 270, 276; 690 NW2d 495 (2004) (setting forth the standard of review for the admission of evidence).

Respondent mother next argues that termination of her parental rights was improper because no services were offered to rectify the conditions that existed when the court acquired jurisdiction over the children. In general, when a child is removed from the custody of the parents, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan. MCL 712A.18f(1), (2), (4). However, services are not required in all situations. *In re Terry*, 240 Mich App 14, 26, n 4; 610 NW2d 563 (2000). In the instant case, pursuant to agency policy, reunification of the children with respondent mother was not a goal, and petitioner did not offer services to respondent mother because of her conviction of fourth-degree criminal sexual conduct. Thus, petitioner adequately justified its decision not to provide services to respondent mother, as required by MCL 712A.18f(1)(b).[3]

Both respondents challenge the sufficiency of the evidence for the termination of their parental rights. The trial court did not clearly err by finding that at least one statutory ground for termination was established with respect to each respondent by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Respondent mother's parental rights were terminated under MCL 712A.19b(3)(c)(i). The primary condition of adjudication relating to respondent mother was her inability to care for the children, established by her admission that she lacked a job or home. At the time of the termination trial, respondent mother did have a one-bedroom apartment, which she obtained just a day or two before trial. By

[3] We note that respondent's conviction of fourth degree criminal sexual conduct under MCL 750.520e would by itself supply sufficient grounds for termination under MCL 712A.19b(3)(n). However, statutory subsection (n) was not cited in the termination petition.

the time of the next day of trial, respondent mother had had the apartment for about two months. However, she did not have a job, having been fired from her job at Taco Bell.

Respondent mother has not demonstrated an ability to provide ongoing care for the children. She was reincarcerated for eighteen days because of a probation violation between the first and second days of the termination trial. The testimony of the foster care worker indicated that respondent mother was incarcerated for probation violations twice following her initial release. While incarcerated from May 2004 until October 2004, respondent mother also had a number of violations, ultimately leading to the revocation of her visits with the children. Thus it is clear that respondent mother's failure to comply with the terms of her sentence and probation has interfered with her ability to meet the needs of the children. Respondent mother lives with her boyfriend, who was charged with domestic violence against her, even though she acknowledges that this is bad for her children. Although other evidence indicated that respondent mother is a motivated and active participant and has substantially benefited from therapy, her conduct unfortunately indicates that she continues to lack the ability to care for the children.

The trial court was also justified in concluding that the conditions of adjudication would not be rectified within a reasonable time considering the ages of the children. Respondent mother has not demonstrated stability for any period of time. She has only begun to address her sexual offender issues, and testimony indicated that this process would take at least one year. On appeal, respondent mother relies on testimony by her therapist, who did not consider respondent mother at risk of sexually assaulting her children. However, the therapist also acknowledged that if some of the allegations that respondent mother denied were actually true, this would indicate predatory behavior. Even assuming that respondent mother poses no sexual threat to the children, her impulsiveness and instability are likely to place the children at other risks. During the pendency of this case respondent's inability to comply with the conditions of incarceration or probation has deprived the children of visits and, even during the termination trial, resulted in her reincarceration. Under these circumstances, the trial court did not clearly err by finding no reasonable likelihood that the conditions of adjudication would be rectified within a reasonable time considering the ages of the children.[4] MCL 712A.19b(3)(c)(i).

The trial court also did not clearly err by terminating the parental rights of respondent father on the ground that there was a reasonable likelihood that the children would be harmed if returned to his care. MCL 712A.19b(3)(j). Although the court ordered respondent father to obtain independent housing to demonstrate his ability to care for himself and the children, the record does not indicate that he did so. Indeed, the record demonstrates, and the trial court concluded, that the evidence introduced by respondent father regarding an independently

[4] Respondent mother contends that testimony concerning the children's insecure attachment should not have been considered because respondent mother was only allowed limited supervised visitation. However, this circumstance was certainly attributable to respondent mother's conviction for criminal sexual conduct and a rational response to it. Further, respondent mother's violation of conditions of incarceration and probation was also a direct cause of her inability to visit the children for periods of time.

maintained apartment essentially constituted a "charade." Psychologist Andrew Barclay testified that respondent father has an IQ of eighty-one and a mental age of thirteen. He acknowledged that respondent father was found to have an IQ of sixty-six upon other testing. Although Dr. Barclay felt that respondent father could fulfill agency requirements and parent the children, respondent father did not demonstrate the ability to do so. The testimony indicated that respondent father has shown no progress during the pendency of this case. He appeared disinterested during Building Strong Families sessions, even though the facilitator attempted to adapt the program to his limitations. The foster care worker reported that respondent father had difficulty controlling the children and that his visits with them were chaotic. Frequently, the children would leave the room and have to be retrieved by respondent father or by a worker, and other workers often asked the caseworker to have the family be more quiet. It appears clear that respondent father lacks the ability to supervise the two young children adequately. Although there was no evidence that respondent father would directly harm or abuse the children, we believe the trial court was warranted in concluding that his inability to supervise children of this age gives rise to a reasonable likelihood that the children would be harmed if returned to his care. Therefore, the trial court did not clearly err by finding that the provisions of statutory subsection (j) were established by clear and convincing evidence.[5]

Finally, the record supplies no basis to conclude that termination of respondents' parental rights was clearly contrary to the best interests of the children. MCL 712A.19b(5). The children both have substantial developmental delays and insecure attachment, which Dr. Henry attributed to their history of instability and neglect. It was reported that the children responded positively to structure and became more disregulated around their visits with respondents. Dr. Henry strongly opined that both children need permanency, stability, and consistency. Respondent parents have not been able to provide the children with permanency, stability, or consistency, and there is no indication that they will be able to do so within a reasonable time. On this record, there is no evidence to suggest that termination is clearly contrary to the best interests of the children.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Alton T. Davis

[5] We note that, in his appellate brief, respondent father makes a vague argument regarding evidentiary rulings by the trial court. We deem the argument abandoned because of inadequate briefing. See *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004).